

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RAYMOND AYALA,)
) No. CV-05-5052-CI
Plaintiff,)
) ORDER GRANTING IN PART
v.) PLAINTIFF'S MOTION FOR SUMMARY
) JUDGMENT AND REMANDING FOR
JO ANNE B. BARNHART,) ADDITIONAL PROCEEDINGS
Commissioner of Social) PURSUANT TO SENTENCE FOUR OF
Security,) 42 U.S.C. § 405(g)
)
Defendant.)
)

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 13, 17) submitted for disposition without oral argument on February 6, 2006. Attorney Tom Bothwell represents Plaintiff; Special Assistant United States Attorney Jeffrey H. Baird represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS IN PART** Plaintiff's Motion for Summary Judgment and remands for additional proceedings pursuant to sentence four of 42 U.S.C. §405(g).

Plaintiff, 50-years-old at the time of the administrative decision, protectively filed applications for Social Security

1 disability and Supplemental Security Income (SSI) benefits on June
2 5, 2001,¹ alleging disability as of May 5, 2001, due to psychological
3 problems, diabetes, sleeping disorder, breathing problems,
4 arthritis, post surgical knee problems, foot problems and side
5 effects of medications. (Tr. at 89.) Plaintiff had a high-school
6 education, two years of college and some vocational training. (Tr.
7 at 23.) Past work experience included automotive salesperson.
8 Following a denial of benefits at the initial stage and on
9 reconsideration, a hearing was held before Administrative Law Judge
10 Richard Hines (ALJ). The ALJ denied benefits; review was denied by
11 the Appeals Council. This appeal followed. Jurisdiction is
12 appropriate pursuant to 42 U.S.C. § 405(g).

13 ADMINISTRATIVE DECISION

14 The ALJ concluded Plaintiff was insured for disability benefits
15 through the date of his decision, and had not engaged in substantial
16 gainful activity. Plaintiff suffered from severe injuries secondary
17 to a motor vehicle accident in 1987, including diabetes, status post
18 old fractures and knee surgery. The ALJ found the mental
19 impairments did not meet the durational requirements and did not
20 pose more than minimal limitations on his ability to work. (Tr. at
21 26.) The ALJ rejected Plaintiff's testimony as not fully credible.
22 The ALJ concluded Plaintiff retained the residual capacity to
23 perform a full range of light work and was able to perform past
24 relevant work as an auto salesman. (Tr. at 28.)

25 ¹A prior application for disability benefits was denied
26 September 25, 1997. (Tr. at 22.) The ALJ did not find reasons to
27 reopen that application.
28

1 **ISSUES**

2 The question presented is whether there was substantial
3 evidence to support the ALJ's decision denying benefits and, if so,
4 whether that decision was based on proper legal standards.
5 Plaintiff contends there is no evidence to support the ALJ's
6 conclusion Plaintiff can return to his past relevant work as an auto
7 salesman because he has no driver's license. Additionally, there is
8 no evidence Plaintiff can perform a full range of light work due to
9 the opinion of the treating physician that Plaintiff was limited to
10 sedentary work and suffered from side effects of medication.
11 Additionally, Plaintiff contends he suffered from more than non-
12 severe mental impairments. Finally, Plaintiff contends the ALJ
13 should have credited his complaints of pain.

14 **STANDARD OF REVIEW**

15 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
16 court set out the standard of review:

17 The decision of the Commissioner may be reversed only if
18 it is not supported by substantial evidence or if it is
19 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
20 1097 (9th Cir. 1999). Substantial evidence is defined as
21 being more than a mere scintilla, but less than a
22 preponderance. *Id.* at 1098. Put another way, substantial
23 evidence is such relevant evidence as a reasonable mind
24 might accept as adequate to support a conclusion.
25 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the
26 evidence is susceptible to more than one rational
27 interpretation, the court may not substitute its judgment
28 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
Morgan v. Comm'r of Soc. Sec. Admin. 169 F.3d 595, 599
(9th Cir. 1999).

25 The ALJ is responsible for determining credibility,
26 resolving conflicts in medical testimony, and resolving
27 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
28 Cir. 1995). The ALJ's determinations of law are reviewed
de novo, although deference is owed to a reasonable
construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

SEQUENTIAL PROCESS

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the requirements necessary to establish disability:

Under the Social Security Act, individuals who are "under a disability" are eligible to receive benefits. 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any medically determinable physical or mental impairment" which prevents one from engaging "in any substantial gainful activity" and is expected to result in death or last "for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Such an impairment must result from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a claimant will be eligible for benefits only if his impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy" 42 U.S.C. § 423(d)(2)(A). Thus, the definition of disability consists of both medical and vocational components.

In evaluating whether a claimant suffers from a disability, an ALJ must apply a five-step sequential inquiry addressing both components of the definition, until a question is answered affirmatively or negatively in such a way that an ultimate determination can be made. 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The claimant bears the burden of proving that [s]he is disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). This requires the presentation of "complete and detailed objective medical reports of h[is] condition from licensed medical professionals." *Id.* (citing 20 C.F.R. §§ 404.1512(a)-(b), 404.1513(d)).

MISSING / ADDITIONAL EVIDENCE

Plaintiff first asserts the administrative record is incomplete and does not include medical records that were considered by the Appeals Council. Plaintiff has attached the missing records to his Memorandum of Authorities. (Ct. Rec. 14, 15.) Defendant responds the court should not review this evidence because the Appeals Council chose to deny Plaintiff's request for administrative review

1 and chose not to include any new evidence in the administrative
2 record. (Tr. at 7-10.) Defendant contends these were discretionary
3 choices and not final decisions made after a hearing. Thus,
4 Defendant asserts this court is barred under the doctrine of
5 sovereign immunity from considering the records attached to
6 Plaintiff's Memorandum. Moreover, to the extent the evidence is
7 new, Plaintiff has not established good cause and materiality to
8 support a sentence six remand under 42 U.S.C. § 405(g).

9 The administrative record discloses Plaintiff's counsel was
10 notified by the Social Security Administration on August 3, 2004,
11 that if additional evidence were to be submitted to the Appeals
12 Council, it needed to be sent within 25 days of August 3, 2004. (Tr.
13 at 14.) On February 14, 2005, Plaintiff's counsel submitted
14 additional evidence including the following documents:

15 (a) physical evaluation (four pages) dated **August 13, 2004**, by
16 Ernest Segren, PAC;

17 (b) psychological / psychiatric evaluation (four pages) dated
18 **August 18, 2004**, by Deborah M. Lusch, RNC;

19 (c) psychological / psychiatric evaluation (four pages) dated
20 **December 8, 2004**, by Ms. Lusch;

21 (d) chart notes and medical records (13 pages) from Lourdes
22 Counseling Center, dated **June 11, 2003, to September 7, 2004**; and

23 (e) chart notes and medical records (104 pages) from La
24 Clinica, Kennewick, dated **February 15, 2002**, (Ct. Rec, 14 at 62) **to**
25 **December 6, 2004**. (Tr. at 12, 13, emphasis added.)

26 With its decision denying review, the Appeals Council set forth
27 the additional evidence considered and made part of the
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1 administrative record:

2 (a) Ex. AC-1, notes from La Clinica dated **February 15, 2003,**²
3 **through November 5, 2003;** and

4 (b) Ex. AC-2, progress notes from Lourdes Counseling Center
5 dated **June 11, 2003, through December 2, 2003.**

6 (Tr. at 11.) Additionally, the Appeals Council noted it reviewed
7 the rest of the supplemental materials submitted by Plaintiff, but
8 refused to make those materials a part of the record because they
9 related to a period of time following the ALJ's decision of November
10 14, 2003. (Tr. at 8.)

11 To the extent supplemental evidence was considered by the
12 Appeals Council and made a part of the administrative record, this
13 court considers that evidence in its review of the ALJ's decision.
14 *Ramirez v. Shalala*, 8 F.3d 1449, 1451-52 (9th Cir. 1993). However,
15 the Appeals Council shall consider "new and material" evidence only
16 if such evidence relates to the period on or before the date of the
17 ALJ's decision. See 20 C.F.R. § 404.970; *Bates v. Sullivan*, 894
18 F.2d 1059, 1064 (9th Cir. 1990), *overruled on other grounds*, *Bunnell*
19 *v. Sullivan*, 947 F.2d 341, 342 (9th Cir. 1991). Thus, the Appeals
20 Council correctly considered and made a part of the administrative
21 record for this court's review only those materials relevant to the
22 time prior to the ALJ's decision dated November 14, 2003.

23 With respect to the rejected evidence, a discretionary decision
24 by the Appeals Council is not a "final" decision "made after a
25 hearing" subject to judicial review. 20 C.F.R. § 404.970(b);

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27 ²The court considers this reference to be a typographical error
28 with the correct date being February 15, 2002.

1 *Matlock v. Sullivan*, 908 F.2d 492, 494 (9th Cir. 1990) (discretionary
2 decision not reviewable); *Taylor v. Heckler*, 765 F.2d 872, 877 (9th
3 Cir. 1985) (discretionary decision is not reviewable).

4 Whether the captioned matter should be remanded for further
5 administrative proceedings based on the new evidence not made part
6 of the administrative record is analyzed under the "good cause" and
7 "materiality" test. *Compare Harman v. Apfel*, 211 F.3d 1172, 1179-80
8 (9th Cir. 2000), *cert. denied*, 534 U.S. 1038 (2000) (stating when
9 claimant submitted additional materials to the Appeals Council in
10 requesting review of the ALJ's decision, "[w]e may properly consider
11 the additional materials because the Appeals Council addressed them
12 in the context of denying Appellant's request for review") with
13 *Burton v. Heckler*, 724 F.2d 1415, 1417 (9th Cir. 1984) ("a remand to
14 the Secretary to consider additional evidence not contained in the
15 administrative record . . . [is] provided for by [42 U.S.C. §
16 405(g)] where the new evidence is material and there is good cause
17 for the failure to incorporate such evidence in the record in a
18 prior proceeding"). Plaintiff has not made an evidentiary showing
19 or legal argument to establish good cause and materiality as to
20 those records dated after November 2003. Accordingly, the evidence
21 not made a part of the administrative record by the Appeals Council
22 does not provide grounds for a sentence six remand.

23 DRIVER'S LICENSE

24 Plaintiff contends the ALJ erred when he concluded there was
25 sufficient evidence to support a finding Plaintiff could perform his
26 past relevant work in auto sales because there was no evidence
27 Plaintiff had a driver's license, a necessary component of such a
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1 position. Defendant responds the ALJ correctly relied on the
2 testimony of a vocational expert, who concluded Plaintiff could
3 perform his past relevant work based on the hypothetical supplied by
4 the ALJ. The vocational expert testified such a position would
5 require a driver's license. (Tr. at 533.) Plaintiff replies there
6 is undisputed evidence, based on his testimony at the administrative
7 hearing, that, for the past year, he was not able to renew his
8 driver's license. (Tr. at 504.) When questioned whether a doctor
9 advised he would not be able to have one, Plaintiff responded "I'm
10 fighting for it right now." (Tr. at 505.)

11 Plaintiff, who carries the burden at step four, did not
12 identify any medical records or opinions that would preclude him
13 from renewing his driver's license, other than his testimony, which
14 was determined to be not credible. Additionally, the medical record
15 indicates on two separate occasions Plaintiff reported that his
16 license was suspended for failure to complete a drug and alcohol
17 treatment program as part of his sentence following a DUI. (Tr. at
18 372, 488.) Thus, there is no evidence Plaintiff's failure to secure
19 a driver's license was related to his medical condition. There was
20 no error.

21 **STEP TWO - MENTAL HEALTH**

22 Plaintiff contends there was error when the ALJ concluded he
23 was capable of a full range of light work notwithstanding his non-
24 exertional impairments. Those impairments included emotional
25 limitations, side effects of the many medications he was taking, and
26 severe pain, and knee limitations. Defendant responds Dr. Bennett,
27 a psychiatrist, concluded in August 2003 that Plaintiff had good
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1 mood with congruent bright affect and mental status examination
2 without clinical focus, except for a mild dysphoric affect noted on
3 June 11, 2003. Defendant concludes these findings are similar to
4 the ALJ's conclusion that any mental impairments resulted in no more
5 than a mild limitation.

6 In his opinion, the ALJ rejected severe mental limitations,
7 noting a "brief" psychiatric examination in 2002 noted Plaintiff
8 complained of audio and visual hallucinations. However, the ALJ
9 also noted Plaintiff was treated with a low dose of Celexa,
10 indicative of the mild nature of his impairment, and treatment
11 occurred only in 2002, less than the durational requirement of one
12 year. (Tr. at 25, 26.)

13 At step two of the sequential process, the ALJ must conclude
14 whether Plaintiff suffers from a "severe" impairment, one which has
15 more than a slight effect on the claimant's ability to work. To
16 satisfy step two's requirement of a severe impairment, the claimant
17 must prove the existence of a physical or mental impairment by
18 providing medical evidence consisting of signs, symptoms, and
19 laboratory findings; the claimant's own statement of symptoms alone
20 will not suffice. 20 C.F.R. § 416.908. The effects of all symptoms
21 must be evaluated on the basis of a medically determinable
22 impairment which can be shown to be the cause of the symptoms. 20
23 C.F.R. § 416.929. Once medical evidence of an underlying impairment
24 has been shown, medical findings are not required to support the
25 alleged severity of pain. *Bunnell v. Sullivan*, 947 F.2d 341, 345
26 (9th Cir. 1991). However, an overly stringent application of the
27 severity requirement violates the statute by denying benefits to
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1 claimants who do meet the statutory definition of disabled. *Corrao*
2 *v. Shalala*, 20 F.3d 943, 949 (9th Cir. 1994). Thus, the
3 Commissioner has passed regulations which guide dismissal of claims
4 at step two. Those regulations state an impairment may be found to
5 be not severe *only* when evidence establishes a "slight abnormality"
6 on an individual's ability to work. *Yuckert v. Bowen*, 841 F.2d 303,
7 306 (9th Cir. 1988) (citing Social Security Ruling 85-28). The ALJ
8 must consider the combined effect of all of the claimant's
9 impairments on the ability to function, without regard to whether
10 each alone was sufficiently severe. See 42 U.S.C. § 423(d)(2)(B)
11 (Supp. III 1991). The step two inquiry is a *de minimis* screening
12 device to dispose of groundless or frivolous claims. *Bowen v.*
13 *Yuckert*, 482 U.S. 137, 153-154.

14 The medical record discloses Plaintiff was examined in 1997 by
15 Bruce Duthie, Ph.D; no Axis I or II diagnosis was made. (Tr. at
16 194, 196.) Those findings were reiterated in 1998 by consultant
17 Michael Brown. (Tr. at 208.) However, in October 2001, Dr. Barnard
18 noted a mild limitation in functioning and concentration. (Tr. at
19 244.) Plaintiff began counseling in January 2002 at the Sunderland
20 Family Treatment Services under the direction of Dr. Bennett after
21 self referral for treatment of increasing depression. (Tr. at 324.)
22 Plaintiff was observed to have "obviously unusual" thought process
23 and insight and judgment. (Tr. at 327.) In March 2002, Dr. Bennett
24 diagnosed post-traumatic stress disorder (PTSD), and depression
25 secondary to general medical condition. Plaintiff reported visual
26 and auditory hallucinations. (Tr. at 329.) Plaintiff's global
27 assessment of functioning was scored at 45, indicative of serious

1 limitations. (Tr. at 330.) DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL
2 DISORDERS, FOURTH EDITION (DSM-IV), at 32 (1995). Plaintiff was
3 initially prescribed a low dose of Celexa - 10 mg qd³- as noted by
4 the ALJ, but that prescription increased to 40 mg qam⁴ on April 9,
5 2002. (Tr. at 330, 347.) On July 18, 2002, that prescription was
6 increased again to 80 mg qam. (Tr. at 360.) Lexapro, 20 mg qd, was
7 substituted on October 17, 2002, and renewed on June 11, 2003. (Tr.
8 at 490.) Thus, records submitted to the Appeals Council record
9 continued treatment for mental impairments exceeding the one year
10 durational requirement and prior to the date of last insured.
11 Moreover, the record of prescriptions exceeded the initial low dose
12 that supported the ALJ's finding Plaintiff's mental impairments were
13 non-severe. The medical record, including the supplemental
14 materials dated prior to November 1993 submitted to and accepted by
15 the Appeals Council, do not support the ALJ's finding Plaintiff's
16 mental impairments were non-severe.

17 Upon remand, the ALJ shall reassess the credibility findings in
18 light of the psychiatric record, secure the testimony of a mental
19 health expert, if necessary, and consider the residual side effects,
20 if any, of the numerous medications prescribed for Plaintiff.
21 Accordingly,

22 **IT IS ORDERED:**

23 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
24 **GRANTED IN PART;** the captioned matter is **REMANDED** for additional
25 proceedings pursuant to sentence four of 42 U.S.C. § 405(g).

26 ³Once a day.

27 ⁴Every morning.

4. The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. The file shall be **CLOSED** and judgment entered for Plaintiff.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE